No. 72-734

# In the Supreme Court of the United States

OCTOBER TERM, 1972

pre-Gelbard decision of CA 6

UNITED STATES OF AMERICA, PETITIONER

*v.*

JOHN P. CALANDRA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 465 F. 2d 1218. The opinion of the district court (Pet. App. D) is reported at 332 F. Supp. 737.

### JURISDICTION

The judgment of the court of appeals was entered on July 27, 1972. A timely petition for rehearing was denied on September 19, 1972. On October 11, 1972,

Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including November 18, 1972. The petition was filed on November 17, 1972, and was granted on February 20, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether a grand jury witness (for whom the government has sought transactional immunity under 18 U.S.C. 2514) is entitled to refuse to answer questions put by the grand jury on the ground that the questions are based upon leads which were the product of an illegal search and seizure.

## STATEMENT

On December 11, 1970, federal agents secured a warrant for the search of respondent's place of business, the Royal Machine and Tool Company, in Cleveland, Ohio (A. 5-6). The warrant was issued in connection with an investigation of suspected illegal gambling activities, and the object of the search was the discovery of bookmaking records and wagering paraphernalia. Allegations for the warrant had been submitted as part of a master affidavit covering several persons and places believed to have been involved in the suspected bookmaking operations of Joseph Lanese (A. 11-29).

The information contained in the affidavit had been obtained from five informants, from the observations of surveilling agents, and from court-approved elec-

tronic surveillance. The principal information concerning respondent was supplied by an informant who had been assisting federal agents in connection with gambling cases for approximately seven years (A. 28). This informant advised the federal agents that respondent used his business office for a bookmaking operation (A. 21).[1]

On December 15, 1970, federal agents executed the warrant directed at respondent's place of business and various papers were seized. While no significant gambling paraphernalia were found during the course of the search, an agent did discover, among certain promissory notes, a card which indicated that Dr. Walter Loveland was making periodic payments to respondent. The agent was personally aware that the United States Attorney for the Northern District of Ohio was investigating possible violations of 18 U.S.C. 892, 893 and 894, dealing with extortionate credit transactions, and that Dr. Loveland had been a victim

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[1] The informant also supplied information with respect to the gambling activities of individuals other than respondent, including Lanese (A. 17, 22-23). In each instance, the bookmaking activities alleged by the informant were corroborated by independent investigation (A. 13-18, 21-23). The informant had "personal knowledge of the bookmaking activity of Joseph Lanese in that for over an extensive period of time he [had] himself or personally known of others who [had] made wagers with or received line information from Joseph Lanese" (A. 28).

In addition to the information supplied by the informant, wiretap information and physical surveillance disclosed a betting relationship between respondent and Lanese (A. 17, 19-20).

of a loansharking enterprise being investigated (A. 50). The agent concluded that the card bearing Dr. Loveland's name was a loansharking record, and it was therefore seized.

In March 1971, a special grand jury was convened in the Northern District of Ohio in order to investigate possible loansharking activities. Respondent was subpoenaed as a witness and appeared before the grand jury on August 17, 1971. Respondent invoked his privilege against self-incrimination and refused to answer any questions. The government then requested that the district court grant respondent transactional immunity pursuant to 18 U.S.C. 2514 (A. 30-34). Respondent filed a "Request for Postponement of Hearing on Application for Immunity Order" so that he might move to suppress the evidence seized eight months earlier, which the government intended to use as a basis for questioning him (A. 35-36).

After a hearing, the district court held that respondent was entitled "to litigate the question of whether the evidence which constitutes the basis for the questions asked of him before the grand jury has been obtained in a way which violates the constitutional protection against unlawful search and seizure" (Pet. App. 37; 332 F. Supp. at 742). The court then found that the search warrant had been issued without probable cause and that, in any event, the scope of the search was overly broad. On the basis of this finding, the court granted two kinds of relief: it ordered the evidence to be suppressed and returned to respondent, and it further ordered that

respondent need not answer any grand jury questions based upon the suppressed evidence (Pet. App. 45; 332 F. Supp. at 746).

On the government's appeal, the court of appeals affirmed. The court held that the district court had properly entertained the suppression motion and that the Fourth Amendment exclusionary rule may be invoked by a grand jury witness as a bar to questioning based on an illegal search and seizure (Pet. App. 11-24; 465 F. 2d 1218). On the merits, the court summarily agreed with the district court that the search of respondent's business premises and the seizure of the loansharking record were unlawful (Pet. App. 23, n. 5; 465 F. 2d at 1226, n. 5).

## SUMMARY OF ARGUMENT

### A

It is well established that a grand jury is entitled to consider and act upon evidence that would be inadmissible at trial. This general rule, which applies to hearsay, tips, rumors, confessions and other evidence that might be excluded from a trial, naturally embraces probative evidence that may have been unlawfully obtained. The suppression of such probative evidence interferes with the public interest in allowing grand juries considerable latitude in pursuing the truth and helping to bring the guilty to book. Moreover, permitting reluctant grand jury witnesses to insist upon suppression hearings to challenge the legality of searches that may relate to their questioning would result in protracted interruption of grand

jury proceedings and thereby frustrate the public interest in the fair and expeditious administration of the criminal law. For these reasons a grand jury witness is not entitled to exclude probative evidence from consideration by the grand jury on the ground it was allegedly seized illegally, and he is similarly not entitled to a court order authorizing him to refuse to give oral testimony that may be based on the items seized.

B

But even assuming *arguendo* that unlawfully obtained evidence may in some situations be ordered withheld from the grand jury, respondent lacks standing to challenge the evidence here because he has been offered immunity. The exclusionary rule may be invoked only by a person who is both the subject of the search and also the one against whom the evidence is sought to be admitted. The exclusionary rule has never operated to block the use of probative evidence against third parties. In a case like this, however, where the grand jury witness seeking suppression is not himself subject to prosecution, it would be an extravagant extension of that rule to enable him to preclude the grand jury from considering the seized evidence or his responses to questions based on it against *other* persons. Such an extension of the exclusionary rule would impair the grand jury's investigative function, interrupt and delay grand jury proceedings, cause the suppression of probative evidence, and result in the release of evident criminal violators, without vindicating any proper interest of

the party aggrieved. That party's Fourth Amendment interests are sufficiently protected by allowing him to seek the return of illegally seized property and the suppression of its use in adversary proceedings *against him.*

## ARGUMENT

### A GRAND JURY WITNESS WHO HAS BEEN OFFERED IMMUNITY IS NOT ENTITLED TO INVOKE THE FOURTH AMENDMENT EXCLUSIONARY RULE IN A MOTION TO SUPPRESS EVIDENCE IN ORDER TO AVOID QUESTIONING BASED UPON INFORMATION PRODUCED BY AN ALLEGEDLY ILLEGAL SEARCH AND SEIZURE.

The search and seizure that respondent challenged in the context of a demand for his testimony before a special grand jury had taken place approximately eight months earlier. The search of respondent's place of business was conducted under a warrant issued by a United States Commissioner (A. 5-6) on the basis of a detailed affidavit (A. 13-29). In making the search for documents used in an illegal gambling enterprise, an F.B.I. agent discovered a record that he believed constituted the evidence and instrumentality of a federal loansharking offense against a previously identified victim.

Interrupting respondent's appearance before the grand jury, the district court entertained his motion and allowed him to forestall the grand jury investigation of the loansharking activities by litigating the validity of the earlier search warrant and the scope of the search under it. Although the government op-

posed the attempt to raise those questions as a basis for refusing to respond to grand jury questions or as a basis for delaying the issuance of an immunity order sought by the government for respondent, we also defended the merits of the search and seizure. As we pointed out in our petition for certiorari (Pet. 7, n. 5), we still maintain that the courts below erred in their decision on the merits but we do not ask this Court to review that issue. Instead, we deal only with the important threshold question whether a grand jury witness, particularly one who is being offered immunity, may permissibly raise Fourth Amendment objections to the basis of the questions put to him by the grand jury.

**A. A Grand Jury May Consider, And A Grand Jury Witness Must Answer Questions Based Upon, Information Produced By An Illegal Search and Seizure.**

The principle underlying the decisions below apparently is that a grand jury may not consider, and a grand jury witness need not answer questions based upon, information produced by an illegal search and seizure. However, it is well established that a grand jury is entitled to consider and act upon evidence which would be inadmissible at a trial. This general rule naturally embraces evidence which has been unlawfully obtained, and the considerations underlying the Fourth Amendment exclusionary rule do not mandate a contrary result. Accordingly, illegally seized evidence may not be ordered withheld from the grand jury, and as a corollary, a grand jury witness

may not be excused from answering questions merely because the questions are based upon such evidence.

1. This Court has often emphasized the broad investigatory powers necessarily possessed by the grand jury. As "a great historic instrument of lay inquiry into criminal wrongdoing" (*United States* v. *Johnson*, 319 U.S. 503, 512), the grand jury is empowered to operate "free from technical rules, acting in secret." *Costello* v. *United States*, 350 U.S. 359, 362. The importance of this investigatory role was strongly reaffirmed last Term in *Branzburg* v. *Hayes*, 408 U.S. 665, 700-701:

> The investigative power of the grand jury is necessarily broad if its public responsibility is to be adequately discharged. * * *
>
> * * * [T]he investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen * * *. * * *
>
> * * * The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. * * * "When the grand jury is performing its investigatory function into a general problem area * * * society's interest is best served by a thorough and extensive investigation." * * * A grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a

> crime has been committed." * * * Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. * * *

As is clear from the Court's discussion in *Branzburg*, the grand jury is not restricted to evidence which would be admissible at trial. "[T]he scope of [its] inquiries is not * * * limited narrowly by questions of propriety * * *." *Blair* v. *United States*, 250 U.S. 273, 282. "Its work is not circumscribed by the technical requirements governing the ascertainment of guilt once it has made the charges that culminate its inquiries." *United States* v. *Johnson*, *supra*, 319 U.S. at 510. Thus in *Holt* v. *United States*, 218 U.S. 245, this Court refused to quash an indictment supported primarily by incompetent evidence. Similarly, in *Costello* v. *United States*, *supra*, the Court upheld an indictment based solely on hearsay testimony, stating (350 U.S. at 362) "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act." An indictment valid on its face must be sustained even if the grand jury acted on the basis of information obtained in violation of the defendant's privilege against self-incrimination. *United States* v. *Blue*, 384 U.S. 251; *Lawn* v. *United States*, 355 U.S. 339. As the Court noted in *Costello* v. *United States*, *supra*, 350 U.S. at 364, to permit "defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence * * * would run counter to the whole history of the grand jury

institution, in which laymen conduct their inquiries unfettered by technical rules."

2. If its historic role is to be properly fulfilled, the grand jury must be empowered to conduct full and expeditious investigations into criminal activity, unhampered by technical rules of evidence and the adversary proceedings which they entail. This consideration is the underlying rationale for allowing the grand jury to act on the basis of evidence that would not be admissible at a trial. In view of this rationale and the cases just discussed, it appears clear that a grand jury may consider and act upon evidence which has been illegally seized.[2] Such evidence, although inadmissible at trial, is trustworthy and probative, and should, like disputable confessions, hearsay, "tips,

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[2] The court below apparently read *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, as barring grand jury consideration of illegally seized evidence. However, that is not the holding of that case. In *Silverthorne* this Court reviewed a contempt order entered against a corporation and its president for refusing to honor a subpoena to produce corporate records. The order was reversed on Fourth Amendment grounds but the rationale was that the grand jury was being used improperly: it had returned a criminal indictment against the corporation and its president *before* the search and seizure—without warrant—had taken place; before the grand jury subpoena to produce the documents was served, the district court in an independent proceeding unrelated to the grand jury's request had already ruled the search and seizure illegal, and had ordered the papers returned. In that context, this Court ruled that the prior adjudication that the papers had been illegally seized and turned over to the grand jury in connection with the criminal investigation against the Silverthornes precluded subsequent efforts to require their production pursuant to subpoena.

rumors * * * or the personal knowledge of the grand jurors" (*Branzburg* v. *Hayes*, *supra*, 408 U.S. at 701), be available to the grand jury.

The soundness of this conclusion is reinforced by considering the interruption and interference which would be caused by extending the exclusionary rule to grand jury investigations. The exclusionary rule would, as is evidenced by the decisions below, not only withdraw probative evidence from the grand jury's consideration but also cause the protracted delay characteristic of adversary proceedings. Suppression hearings, which would be required for effective enforcement of the exclusionary rule, are time-consuming; they frequently involve the determination of difficult questions of fact and law and thereby require the presentation of evidence, oral argument, and in many instances the preparation and filing of briefs as well. The consequent delay that would be imposed upon the grand jury would intolerably interfere with "the proper performance of its constitutional mission." *United States* v. *Dionisio*, No. 71-229, decided January 22, 1973, slip op. at 16. It was in part for that reason that this Court in *Dionisio*, and the companion case, *United States* v. *Mara*, No. 71-850, decided January 22, 1973, held that a grand jury witness must provide voice or handwriting exemplars without an adversary hearing on the grand jury's need for the information or on the "reasonableness" of the demand under the Fourth Amendment. The Court emphasized in *Dionisio* (slip op. at 16) that, if the grand jury is "even to approach the proper per-

formance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it."

Respondent seeks precisely this litigious interference with grand jury proceedings, in order to try collateral issues and suppress material evidence, even though none of his "legitimate rights" is at stake in the grand jury proceedings and he has other remedies to protect his legitimate interests. See, pp. 19, 23, n. 9, *infra*. He demands, and the courts below granted, "a full-blown suppression hearing * * * [causing a] protracted interruption of grand jury proceedings." *Gelbard* v. *United States*, 408 U.S. 41, 70 (concurring opinion of Mr. Justice White). But there is no warrant in the opinions of this Court for the satisfaction of such a demand. To the contrary, the Court has repeatedly discouraged litigious interference with the grand jury. See *United States* v. *Ryan*, 402 U.S. 530; *Cobbledick* v. *United States*, 309 U.S. 323. The importance of unimpeded grand jury investigations was strongly reaffirmed only a few months ago in *United States* v. *Dionisio*, *supra*, slip op. at 15-16:

> Any holding that would saddle a grand jury with mini-trials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws.

Extending the scope of the exclusionary rule to grand jury proceedings would have the result condemned by

this Court in *Dionisio*—the impeding of the grand jury's investigation, both through delay and the withholding of probative evidence, with the consequent disruption of law enforcement. In order to protect "the public's interest in the fair and expeditious administration of the criminal laws," grand juries must be allowed to consider and act upon unlawfully obtained evidence, and therefore such evidence cannot be withheld from a grand jury upon a motion to suppress.

The Court's decision in *Gelbard* v. *United States*, 408 U.S. 41, strongly suggests that this general principle remains valid. In that case the Court explicitly noted (408 U.S. at 45, n. 5) that it was not establishing a "right of a grand jury witness to rely upon the Fourth Amendment as a basis for refusing to answer questions" before a grand jury. Rather, in that case the right to litigate the basis upon which questions were being posed was rested solely on the unique provisions of the federal wiretapping statute, 18 U.S.C. 2515. Those provisions are, of course, inapplicable here, where the validity of a physical search of the premises, not of a wiretap, is being raised. In his separate concurring opinion, Justice White stated that the result reached by the Court was "rooted in a complex statute" and that the decision, to that limited extent, "unquestionably works a change in the law with respect to the rights of grand jury witnesses" (408 U.S. at 70), a change which he suggested might not even have a statutory basis if the wire interception had taken place pursu-

ant to a warrant.[3] Therefore, a majority of the Justices in *Gelbard* evidently recognized that where there is no special statutory basis for challenging the evidentiary predicate on which grand jury testimony is sought, a hearing on such a challenge is "not only unauthorized by law, but completely contrary to the ingrained principles which have long governed the functioning of the grand jury." 408 U.S. at 78 (dissenting opinion of Mr. Justice Rehnquist, joined by Burger, C.J., and Blackmun and Powell, JJ.).

In short, as a majority of this Court evidently agreed, the exclusionary rule has not been, and should not be, extended to grand jury proceedings. See also *Truchinski* v. *United States*, 393 F. 2d 627 (C.A. 8), certiorari denied, 393 U.S. 831.[4]

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[3] In the present case, of course, the seizure took place during the execution of a federal search warrant.

[4] Nothing in Rule 41(e) of the Federal Rules of Criminal Procedure, relied on by the courts below, supports respondent's claim to avoid testifying before the grand jury. Rule 41(e) merely "conforms to the general standard and is no broader than the constitutional rule." *Alderman* v. *United States*, 394 U.S. 165, 173, n. 6. See, also, *Jones* v. *United States*, 362 U.S. 257, 261. Thus Rule 41(e) (both at the time of the hearing and in its present form) simply provides that a successful motion for return of illegally seized property and for suppression makes the property inadmissible "in evidence at any hearing or trial." By its terms, therefore, Rule 41(e) does not purport to authorize exclusion of probative evidence from grand jury proceedings, which are neither hearings nor trials. Compare 18 U.S.C. 2515, before the Court in *Gelbard*, which made the fruits of illegal wiretapping inadmissible "in any trial, hearing, *or other proceeding* in or before any court, *grand jury*, department * * * [etc.]" (emphasis added).

The present case, indeed, involves more than simply the exclusion of evidence that had allegedly been seized illegally, for respondent has also been granted the privilege not to answer questions that are "based" on the evidence suppressed. But it follows *a fortiori* from what we have discussed that no grand jury witness is entitled to seek a judicial order protecting him against questioning based on unlawfully obtained evidence. Such an order, like a suppression order, would require an elaborate judicial inquiry into the circumstances surrounding the search and an analysis of the relevant legal principles, and would therefore interfere with the conduct of the grand jury investigation in the same manner, and to the same extent, as a "full-blown suppression hearing." Moreover, "the long-standing principle that 'the public * * * has a right to every man's evidence' * * * is particularly applicable to grand jury proceedings." *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 688. *United States* v. *Dionisio*, *supra*, slip op. at 8.

Thus, while his Fifth Amendment privilege against self-incrimination may be invoked by a grand jury witness where applicable, there is no justification for establishing a new privilege under the Fourth Amendment that would allow him to conceal probative and relevant testimony from the grand jury simply because the questions put to him may be based on improperly seized evidence.[5] The Fifth Amendment

[5] Grand jury witnesses traditionally have not been permitted a full adjudication of broad claims of testimonial privilege or immunity prior to appearing before the grand jury; even when available in grand jury proceedings, such claims are

privilege, coupled with the Fourth Amendment remedies traditionally available under Rule 41(e)—return of the seized property and exclusion of the property and its fruits from an *adversary* hearing or trial—are broad enough to protect the grand jury witness's legitimate interests. The courts below therefore erred in holding that respondent need not answer any questions based upon the allegedly illegally seized evidence.[6]

3. Furthermore, the holding of the court below does not significantly advance the purposes of the Fourth Amendment exclusionary rule. A grand jury witness has other remedies that are adequate to vindicate his personal Fourth Amendment interests, without creation of a new application of the exclusionary rule to grand jury proceedings. But the deterrent objective of the exclusionary rule likewise would not support the expansion decreed below. The extent to which the exclusionary rule accomplishes its deterrent objective at all is not known and perhaps cannot be known (see *Elkins* v. *United States*, 364 U.S. 206, 218), and the efficacy of the rule has been broadly

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properly litigated as defenses to charges of contempt for a refusal to testify to particular questions. Cf. *United States* v. *Ryan*, *supra*; *Cobbledick* v. *United States*, *supra*; *Silverthorne Lumber Co.* v. *United States*, *supra*; *Alexander* v. *United States*, 201 U.S. 117.

[6] Since we believe that the exclusionary rule does not extend to grand jury proceedings at all, we would further contend that the illegal seizure, standing alone, would not constitute a defense to a charge of contempt for a completed refusal to testify. However, that issue is not raised in this case.

disputed. See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 424-427 (appendix to dissenting opinion of Chief Justice Burger). In light of this widespread uncertainty over the utility of the exclusionary rule, its application should be extended, if at all, only with great caution, in circumstances where the need to safeguard fundamental privacy values outweighs the strong public interest in the disclosure and use of evidence.

The public interest in the prompt and full disclosure of evidence to the grand jury is beyond dispute. See, *e.g.*, *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 699-701; *Costello* v. *United States*, *supra*, 350 U.S. at 362. By contrast, extension of the exclusionary rule to grand juries would do little to promote the privacy interests protected by the Fourth Amendment. For any rule to have a deterrent effect, it must remove an incentive (or impose a punishment), but there is already little or no incentive for the discovery of evidence which cannot be used at trial; thus a holding that illegally seized evidence cannot even be presented to the grand jury has a very limited disincentive or deterrent effect. Such an extension of the exclusionary rule would deter only police investigative action consciously directed toward the discovery of evidence solely for purposes of grand jury consideration; the instances of such intentional police action must be comparatively rare.

Furthermore, this Court has consistently rejected arguments seeking expansion of the exclusionary

rule in order to "intensify" its deterrent objectives. Balancing all of the relevant interests, the Court has concluded that illegally seized evidence can even be used at trials to convict co-defendants if they were not themselves the subjects of the underlying Fourth Amendment intrusion. See, *e.g.*, *Brown* v. *United States*, No. 71-6193, decided April 17, 1973; slip op. 4-7; *Alderman* v. *United States*, 394 U.S. 165, 174; *Wong Sun* v. *United States*, 371 U.S. 471, 492. The essence of such decisions is that more limited remedies are available to vindicate the Fourth Amendment interests at stake and provide an adequate measure of deterrence. In the present context, those remedies would include return of the seized property, exclusion of the property and its fruits from evidence against respondent at a criminal trial, and an action for damages.

Finally, it should not be overlooked that the search in this case was conducted pursuant to a warrant. While it is questionable whether the exclusionary rule serves any deterrent function when investigators are proceeding in good faith pursuant to a judicial warrant, there is certainly no cause to allow a grand jury witness to interrupt grand jury proceedings in a collateral attempt to impeach the validity of a search warrant. See *Gelbard* v. *United States*, *supra*, 408 U.S. at 70 (concurring opinion of Mr. Justice White). That is what respondent has been permitted to do in this case.

For all these reasons this Court should hold that a grand jury witness cannot refuse to testify before

the grand jury by claiming that the questions to be posed are based upon items that may have been seized in violation of the Fourth Amendment.

**B. The Fourth Amendment Exclusionary Rule May Not Be Invoked By A Witness To Prevent Questioning With Respect To Which He Has Been Offered Immunity.**

1. As we have sought to show, no grand jury witness—including the party who may be the target of the investigation—should be permitted to prevent the grand jury from considering evidence seized from him or from securing testimony from him based on the materials seized. But even if a suspected criminal who is himself the subject of a grand jury investigation were to be allowed to require the withholding of allegedly illegally seized evidence from the grand jury, and to refuse to answer grand jury questions based on that evidence, respondent is entitled to no such relief. In this case, respondent has been offered immunity and is obviously seeking only to block the use of evidence against others and not against himself. Extending the exclusionary rule to his claim in this setting would be extravagant.[7]

The exclusionary rule does not "provide that illegally seized evidence is inadmissible against any-

[7] Although this case involves the attempt to confer transactional immunity under 18 U.S.C. 2514, identical considerations would also apply where the witness is offered immunity from the use against him of his compelled testimony and its fruits under 18 U.S.C. 6001-6003. See *Kastigar* v. *United States*, 406 U.S. 441.

one for any purpose." *Alderman* v. *United States, supra,* 394 U.S. at 175. Historically the rule has more narrowly provided only that "evidence obtained in violation of the prohibition of the Fourth Amendment cannot be used in a prosecution against the victim of the unlawful search and seizure if he makes timely objection." *Goldstein* v. *United States,* 316 U.S. 114, 120. Thus the scope of the exclusionary rule, or the standing to suppress the fruits of an illegal search and seizure, has been restricted to one who not only was the subject of the search but also is the person against whom the evidence obtained is sought to be admitted. In short, the exclusionary rule acts only to prevent the conviction at trial of an accused on the basis of evidence seized from him in violation of the Fourth Amendment.

The courts below ignored this fundamental limitation on the scope of the exclusionary rule. In doing so, the court of appeals reasoned (Pet. App. 23-24; 465 F. 2d at 1226-1227) that suppression of the evidence was necessary in order to vindicate respondent's Fourth Amendment rights. But since the evidence, and respondent's testimony with respect to it, was sought only for use against others, no rights of respondent were any longer at issue. As this Court stated in *Alderman* v. *United States, supra,* 394 U.S. at 174:

> There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party.

The Court re-echoed this theme quite recently in reaching a similar result in *Brown* v. *United States*, *supra*.

Furthermore, foreclosure of the use of evidence against third parties is not, in any event, a suitable remedy for infringements upon Fourth Amendment rights. Suppression of evidence in such circumstances merely gratuitously benefits persons who themselves lack standing to complain about the legality of the search; it does not vindicate any cognizable interest of the victim of the search. Respondent essentially is in the same position as a witness who, having refused to testify solely on Fifth Amendment grounds, is offered immunity. Although such a witness may prefer not to testify, he has no constitutionally protected interest in preventing the use of his own self-incriminating but immunized testimony against others. See, generally, *Kastigar* v. *United States*, 406 U.S. 441.[8] There appears to be no reason why a reluctant witness in a grand jury proceeding should be allowed to invoke the Fourth Amendment as a shield for third parties when he could not assert a Fifth Amendment privilege to help them either before the grand jury or at a trial and when it has

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[8] This Court again recently acknowledged, in *United States* v. *Dionisio*, *supra*, slip op. at 8, that a witness may not avoid his responsibility to appear and give evidence even if that duty is burdensome:

> "The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." * * * And while the duty may be "onerous" at times, it is "necessary to the administration of justice."

long been settled that third parties are not derivatively entitled to the benefit of his Fourth Amendment rights at trial.[9]

2. The reasoning of the court of appeals is not limited to grand jury witnesses. The court's rationale would presumably even authorize a non-witness to challenge the presentation of evidence to the grand jury or at trial, on the ground that the discovery of the evidence infringed his Fourth Amendment rights; non-party witnesses at criminal trials could assert a similar claim. There is no basis for this anomalous result: the third-party suspect or defendant, whom the evidence may help indict or convict, cannot suppress it (*Alderman* v. *United States, supra; Goldstein* v. *United States, supra*) and the person whose Fourth Amendment rights were invaded is not further harmed by the use of the evi-

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[9] The court of appeals (Pet. App. 23; 465 F. 2d at 1227) deemed it necessary for respondent's Fourth Amendment claim to be "vindicated in the criminal process." We see no reason why vindication of a mere witness's Fourth Amendment rights must intrude into the criminal process. Respondent may be entitled to assert a cause of action for damages. See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics, supra.* Moreover, outside of the context of the grand jury proceedings, respondent might properly move for the return of the seized property pursuant to Rule 41(e), Fed. R. Crim. P. See *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344. But Rule 41(e), as we have seen (note 4, *supra*), "is no broader than the constitutional rule" (*Alderman* v. *United States, supra,* 394 U.S. at 173, n. 6): it properly contemplates only foreclosure of the use of the evidence against the movant and not suppression of the evidence generally with respect to all parties.

dence against others. Suppression of evidence in such circumstances would simply frustrate legitimate efforts to hold the guilty responsible for their actions without any compensating societal advantage. In addition, permitting non-witnesses or non-defendants to interpose objections to the introduction of evidence before a grand jury or at trial would result in extensive interruption and delay at both the grand jury and trial levels. The individual's remedies under the Fourth Amendment have, for sound reasons, never reached so far.

Thus the extension of the exclusionary rule sanctioned by the courts below would substantially complicate the criminal-justice process, subvert its search for truth, and result in the release of evident criminal violators, without either enhancing the deterrent effect of the rule or vindicating any proper interest of the party aggrieved. At least where he is offered immunity from prosecution or from the use against him of the testimony he may give, a grand jury witness should not be allowed to litigate the validity of the seizure of evidence that may form the basis for questioning him, as a way of escaping his duty to cooperate in the grand jury's inquiry.

## CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the district court for further proceedings.

Respectfully submitted.

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